

**TCEQ DOCKET NO. 2007-1144-IWD**

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2008 JAN -4 PM 2: 27

**APPLICATION BY  
INTERSTATE SOUTHWEST, LTD  
FOR PERMIT NO.  
WATER QUALITY PERMIT  
NO. WQ 0004073000**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

**APPLICANTS RESPONSE TO HEARING REQUESTS**

**TO THE HONORABLE COMMISSIONERS:**

Pursuant to 30 TEX. ADMIN. CODE § 55.209(d), Interstate Southwest, Ltd. ("Applicant"), files this Response to the requests for contested case hearing of Benjamin F. Swank, III and Sharon Swank Backhus ("Requestors"). Applicant urges that the hearing request should be denied based on the failure of the request to substantially comply with the requirements of 30 TEX. ADMIN. CODE § 55.201(d)(2) by demonstrating property ownership or sufficient in the adjacent property. Requesters have failed to raise relevant and material issues for which they have a personal justiciable interest and are therefore not affected in a manner not common to the general public. In the alternative, if the Commission finds that Requesters are affected parties, Applicant urges the Commission to refer only the specific issues raised by Requestors, concurrently refer the matter to Alternative Dispute Resolution, and set the duration of the hearing at 6 months.

**I. Procedural Background**

The application for amendment to water quality permit WQ000407300 was filed with the Texas Commission on Environmental Quality ("TCEQ") on August 16, 2005. The application was declared administratively completed on October 6, 2005 and declared technically complete on December 31, 2005. Notices were properly published on October 19, 2005 and on March 15,

2006 in the *Navasota Examiner*. A public meeting was scheduled for January, 2007 but was delayed due to inclement weather. A public meeting was held March 27, 2007 at which time the public comment period closed. The Executive Director's ("ED") Response to Comments ("RTC") was issued on June 8, 2007.

The application seeks a major amendment to renew an existing TPDES permit and to bring the terms of the permit into compliance with certain amendments to 40 CFR Part 420 *Iron and Steel Manufacturing Point Source Category*, which occurred after the issuance of the original permit. The amendment would make the discharge limits and operating parameters of the permit more stringent.

## **II. Determination of Affected Persons**

Requestors submitted the only letter requesting a contested case hearing, which is dated January 23, 2006. The issues raised by this hearing request are addressed below, as required by 30 TEX. ADMIN. CODE § 55.209(e).

Requestors allege that, "my family owns the property which is adjacent to the Interstate Southwest, Ltd facility . . ."<sup>1</sup>. A review of records available with the Grimes County Appraisal District indicates that Ben Swank, Jr. is the owner of the property adjacent to Applicant's facility, aka Tract 43 (see Attachment 1). Although Requestors state that they have an interest in the property and that their father Benjamin F. Swank, Jr. was the custodian of the property until his death in March 2004, Requestors do not clearly indicate the relationship between those individuals or their interest in the real property adjacent to Applicant's facility. Applicant concedes that the owner of Tract 43 likely satisfies the location requirements for being a person affected. However, Requestors provide no information regarding their ownership of, or legal interest in, Tract 43. Without such information, Applicant does not believe that either individual

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<sup>1</sup> Hearing Request Letter from Benjamin F. Swank, III, dated January 23, 2006, p. 1.

can be found to be a person affected.

### **III. Issues Raised in Hearing Request**

Applicant has identified the following issues raised in the request letter:

**A. Property Value:** Requestors raise a concern that the discharge will lower the economic value of the property. The Commission has long taken the position that issues of property value are outside the scope of its jurisdiction. Further, potential impact to property value is not a relevant factor in evaluating whether or not the Applicant has met the applicable statutory and regulatory criteria. Therefore, concerns over potential impact to property value are not relevant and material to the Commission's decision in this matter and should not be referred to SOAH as a contested issue of fact.

**B. Use and Enjoyment:** Requestors raise a concern that Applicant's activities may affect the use and enjoyment of the property and cite two bases for their concern: (i) health of cattle grazing on the property and drinking from Sandy Creek; (ii) appearance of the land and making the creek unattractive.

Requestors raise a general concern that cattle grazing on the property could be affected by drinking water from the creek or from eating grass on the property. The ED's RTC notes that "[t]he effluent limits in the draft permit will maintain and protect the existing instream uses. No significant degradation of high quality receiving waters is anticipated."<sup>2</sup> In technical review, TCEQ permit staff consulted guidance related to water quality and impact to livestock and found that the "permit limits are very stringent and should not affect the health and performance of livestock."<sup>3</sup> Although these concerns are general and unsubstantiated, staff included permit conditions requiring additions to the Applicant's storm water management practices. The added

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 6.

conditions were based largely on comments received from parties other than the Requestors. As further explained in the ED's RTC, the primary concern affecting livestock are high mineral concentrations (salinity), high nitrogen, bacteria contamination, heavy growth of blue-green algae, petroleum, pesticide and fertilizer spills (none of which except nitrogen are in the waste streams generated by Applicant). However, should the Commission determine that the possibility exists that contaminants of concern to cattle may be present in the Applicant's permitted discharge, Applicant requests that the Commission refer the issue to SOAH reflective of Requestor's concerns: Whether the permitted discharge will have a significant adverse affect the health of cattle grazing on the property and drinking the water in Sandy Creek.

As explained in the Requestors letter, Requestors are also concerned that the discharge will affect their use and enjoyment by affecting "the appearance of the land and [make] the creek unattractive." Appearance is generally not a relevant and material issue protected under the law in the context of TCEQ permitting with regard to concerns about unattractiveness of a regulated activity. However, should the Commission determine to refer this issue to a contested case, Applicant requests that the issue be referred as follows: Whether the permitted discharge will comply with turbidity and color requirements in 30 TEX. ADMIN. CODE §307.4(b)(5).

**C. Concern over Applicant's compliance history:** Requestors raise a concern over the applicant's past compliance with applicable regulations. The ED's RTC notes that the Applicant's compliance history score is calculated pursuant to 30 TEX. ADMIN. CODE Ch. 60 as "average" with a score of 0.25, which is very close to the "high performer" classification.<sup>4</sup> The TCEQ's Compliance History Database currently shows a score of 0.41 based on a rating from September, 2007. Requestors point to an accidental discharge of oily material from Applicant's

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<sup>4</sup> Under 30 TEX. ADMIN. CODE 60.2(e)(2), a score with fewer than 0.10 points is a high performer and a score with 0.10 to 45 points is an average performer.

oil water separator that resulted from a faulty valve as evidence of the concern. As the ED's RTC notes, the TCEQ investigated the incident and found that the Applicant took appropriate measures to address the release and also took appropriate steps to prevent a recurrence. Requestors also state that "rumor has it that there have been other accidents and spills . . ." but offers only hearsay as a basis for concern.<sup>5</sup> Because the Applicant's compliance history is average (and almost high) and because Requestors have not alleged any allegation other than those events already considered in the agency's compliance history formula and rumors, Requestors have not sufficiently raised whether Applicant's compliance history raises a question whether Applicant can substantially comply with the terms of the permit. Since 2000, only eight Notices of Violation have been issued to Applicant. The majority of the NOV's were unrelated to wastewater and none call into question Applicant's ability to substantially comply with the terms of this permit. However, should the Commission determine that a compliance history issue should be referred to a contested case hearing, Applicant requests that the Commission frame the issue as follows: Whether Applicant's documented compliance history for the preceding 5 year period is such that Applicant will not be able to comply with a material term of the permit.

**D. Availability of application in a Public Place:** Requesters allege that the application was not initially available at the Navasota Public Library for public viewing. Applicant regrets that Requesters were not able to view the application and have no explanation why Requesters could not access the documents upon request at the library. Access to the application after filing by the Applicant is not within Applicant's control. However, as indicated by the verification form filed in the Chief Clerk's Office by Applicant and the Affidavit of David Wunderlich, attached as Exhibit A, the application was provided to the Navasota Public Library

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<sup>5</sup> Hearing Request Letter from Benjamin F. Swank, III, dated January 23, 2006, p. 2.

for viewing as publicly noticed.

**E. Concern over impact to the Brazos River:** Requestors raise an issue regarding potential impact to the ultimate receiving water, the Brazos River. 30 TEX. ADMIN. CODE § 55.201(d)(2) requires that a person requesting a hearing explain "... how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public." As Requestors have not alleged that they own property adjacent to the Brazos River or that they have some other particular interest in the Brazos River, Requestors have not satisfied the requirements of §55.201(d)(2) and do not have standing to raise a general concern about the river. Moreover, as the ED and water quality permitting staff note in the ED's RTC, the draft permit has been developed in accordance with 30 TEX. ADMIN. CODE Ch. 307 and the TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (Jan 2003) such that the permitted discharge is appropriately protective of the unnamed tributary of Sandy Creek, Sandy Creek and ultimately the Brazos River.<sup>6</sup>

#### **IV. Conclusion**

Applicant respectfully requests that the hearing requests be denied and that the Commission grant the Applicant's requested permit amendment. The Requestors have not appropriately indicated that they are affected parties based on property ownership nor raised relevant and materials issues for which they have a personal justiciable interest. However, should the Commission determine to refer this matter to a contested case hearing, Applicant requests the following:

1. As a preliminary matter, refer the issue of whether Requestors have sufficient property ownership in Tract 43 to establish standing as affected parties;
2. Refer only the following issues raised by the Requestors if the Commission

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<sup>6</sup> ED's Response to Public Comment, p. 5.

determines the issues have each been sufficiently raised:

- A. Whether the permitted discharge will affect the health of cattle grazing on the property and drinking the water in Sandy Creek;
  - B. Whether the permitted discharge will comply with turbidity and color requirements in 30 TEX. ADMIN. CODE 307.4(b)(5); and
  - C. Whether Applicant's documented compliance history for the preceding 5 year period is such that Applicant will not be able to comply with a material term of the permit;
- 3. Concurrently refer the matter to Alternative Dispute Resolution if the parties are willing;
  - 4. Set a hearing duration of 6 months from the date of the preliminary hearing; and
  - 5. Urge the ED to participate as a party.

Respectfully submitted,

WINSTEAD, PC  
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Houston, Texas 77002  
(713) 650-8400

By: Nathan Block by PSA  
NATHAN BLOCK  
State Bar No. 24005355

**Attorney for Interstate Southwest,  
Ltd.**

**Exhibit A**  
**Affidavit of David Wunderlich**



### CERTIFICATE OF SERVICE

I certify that on this day, the Applicant's Response to Hearing Requests was filed with Office of the Chief Clerk, Texas Commission on Environmental Quality. I further certify that a true and correct copy of the above Applicant's Response to Hearing Requests was sent to each person on the attached Service List via method indicated.

SIGNED January 4, 2008

By: Nathan Block by PSP  
NATHAN BLOCK  
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Houston, Texas 77002  
(713) 650-8400

**Attorney for Interstate Southwest,  
Ltd.**

**SERVICE LIST**  
**INTERSTATE SOUTHWEST, LTD**  
**DOCKET NO. 2007-1144-IWD; PERMIT NO. WQ000407300**

**FOR THE APPLICANT:**

David Wunderlich  
Interstate Southwest, Ltd  
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**(Via Fax and U.S. Mail)**

**FOR THE EXECUTIVE DIRECTOR:**

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**FOR PUBLIC INTEREST COUNSEL:**

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**(Via Fax and U.S. Mail)**

**FOR ALTERNATIVE DISPUTE RESOLUTION:**

Mr. Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-232  
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**(Via Fax and U.S. Mail)**

**FOR THE CHIEF CLERK:**

Ms. LaDonna Castanuela  
Texas Commission on Environmental Quality  
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**(Via Hand Delivery)**

**REQUESTERS:**

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Sharon Swank Backhus  
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Tel: (936) 870-3205  
Fax: (936) 870-3208

**(Via Federal Express and Fax)**

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INTERSTATE SOUTHWEST, LTD  
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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

STATE OF TEXAS

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COUNTY OF GRIMES

**AFFIDAVIT OF DAVID WUNDERLICH**

BEFORE ME, the undersigned notary, on this day, personally appeared David Wunderlich, and after being duly sworn state the following under oath:

1. "My name is David Wunderlich. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.
2. I am the current Safety / Environmental Coordinator for Interstate Southwest, Ltd.
3. I began my employment with Interstate Southwest on or about August 23, 2006, after the initial filing of Interstate Southwest, Ltd's application for major amendment to TPDES Permit No. WX0004073000 (TX 0084034).
4. As part of my duties as Safety / Environmental Coordinator, I have coordinated Interstate Southwest, Ltd.'s permit amendment efforts. In that capacity, I was informed that a true and correct copy of the then most current draft of Interstate Southwest Ltd's application for major amendment to TPDES Permit No. WX0004073000 (TX 0084034) had been placed in the Navasota Public Library by Mr. Ken Morris. Mr. Morris is a former employee of Interstate Southwest, Ltd.

5. On or about February 10, 2007, I personally placed a true and correct copy of the then most current draft of Interstate Southwest Ltd's application for major amendment to TPDES Permit No. WX0004073000 (TX 0084034), replacing the prior copy then on-file with the library.

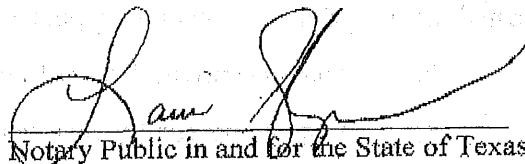
FURTHER Affiant sayeth not.



David Wunderlich  
Safety / Environmental Coordinator  
Interstate Southwest, Ltd.

SWORN AND SUBSCRIBED TO BEFORE ME, the undersigned authority, on this 2nd  
day of January 2008.

My Commission Expires: 5-22-2010

  
Notary Public in and for the State of Texas